IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1660

TERRELL DON HUTTO, Sub Nom, JAMES MABRY, Commissioner, Arkansas Department of Correction; MARSHALL N. RUSH, Chairman, Arkansas Board of Correction; EULA DORSEY, Vice-Chairman, Arkansas Board of Correction; THOMAS H. WORTHAM, M.D., Secretary, Arkansas Board of Correction; RICHARD E. GRIFFIN Member, Arkansas Board of Correction; and JOHN ELROD, Member, Arkansas Board of Correction,

Petitioners,

vs.

ROBERT FINNEY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF OF STATE OF IOWA

RICHARD C. TURNER
Attorney General of Iowa

STEPHEN C. ROBINSON
Special Assistant Attorney General

THEODORE R. BOECKER
Assistant Attorney General

FREDERICK M. HASKINS
Assistant Attorney General

State Capitol
Des Moines, Iowa 50319

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AMICUS BRIEF AUTHORIZED

The State of Iowa files this *amicus curiae* brief pursuant to United States Supreme Court Rule 42, subparagraph 4.

INTEREST OF THE STATE OF IOWA

The State of Iowa submits this *Amicus Curiae* Brief in support of the position of the State of Arkansas for the reason that, like the State of Arkansas, the State of Iowa is faced with a growing number of prison suits under 42 U.S.C. § 1983 and therefore will inevitably be faced with the constitutional problem of an award of attorney fees pursuant to the 1976 Civil Rights Attorney's Fees Act (42 U.S.C. § 1988) payable from its treasury. This is true even though an officer or employee of the State of Iowa is sued, in his individual or official capacity or both, for the reason that pursuant to the Iowa Tort Claims Act, Iowa Code § 25A.22 (1977), (See Addendum A), the State will indemnify the individual, thus prompting an award to flow directly from the treasury of the State of Iowa. In any case, an award of attorney's fees would abrogate Iowa Constitution, Article III, § 24, (See Addendum A), which precludes money being drawn from the state treasury other than in consequence of appropriations made by law, inasmuch as there would be no appropriation by the Iowa General Assembly for attorney's fees. Hence, an award of attorney's fees nominally against an individual officer but in fact payable out of the state treasury would directly undermine the republican principle of federalism as much as would such an award against the State itself.

If, pursuant to 42 U.S.C. § 1988, an award of attorney fees is deemed to be recoverable from a state of the Union, it will not only present an enormous burden upon the treasuries of the various states and be in contravention of the Eleventh Amendment to the Constitution of the United States of America, but will also have a "chilling effect" upon the defense by the states of the laws they have enacted to deal with the difficult and intractable problems of enhancing the public welfare. Accordingly, the State of Iowa urges the reversal of the decision of the Eighth Circuit Court of Appeals on the question of the permissibility of an award of attorney's fees under the Eleventh Amendment.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the United States Constitution has the effect of precluding a monetary award payable from the treasury of the State absent congressional authorization for such an award. An award of attorney's fees falls within the category of a monetary award. Here, there is no congressional authorization for an award of attorney's fees from the Arkansas Department of Corrections, an agency of the State of Arkansas. In light of the clear exclusion of states as "persons" under 42 U.S.C. § 1983 – the statute upon which the present action is based – authorization cannot be accomplished by a cursory comment in the legislative history of 42 U.S.C. § 1988. Therefore, Congress has not acted in a manner sufficient to override the Eleventh Amendment immunity of the states so as to permit an award of attorney's fees against the Arkansas Department of Corrections.

An examination of the fundamental position occupied by the Eleventh Amendment in our Constitution compels the conclusion that an act as profound as congressional authorization for recovery against a state treasury – in effect, waiver of the State's Eleventh Amendment immunity – can be accomplished only by the clearest and most express language. Such language is not present in 42 U.S.C. § 1988. Therefore, it is evident that the Eleventh Amendment protects the State of Arkansas and its Department of Corrections from the award of attorney's fees granted by the Eighth Circuit Court of Appeals.

ARGUMENT

THE ELEVENTH AMENDMENT BARS THE RECOVERY OF ATTORNEY'S FEES FROM THE STATE BECAUSE OF A LACK OF NECESSARY CONGRESSIONAL AUTHORIZATION.

In the case of *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976), an action arising under Title VII of the Civil Rights Act of 1964, the Court held that in order for an award of attorney's fees payable from a state treasury to escape the bar of the Eleventh Amendment, there must be " 'the threshold fact of

congressional authorization' . . . to sue the State." Here, there is an absence of congressional authorization for an award of attorney's fees against the State of Arkansas or its Department of Corrections. The text of 42 U.S.C. § 1988 authorizes attorney's fees in actions under 42 U.S.C. § 1983, the statute under which the present action was brought. But a state or its agencies cannot be sued under that statute. As the Court indicated in *Fitzpatrick v. Bitzer, supra*, at 452, "[t]he Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include states as parties defendant". The significance of the inability under 42 U.S.C. § 1983 to sue a state or its agencies is set forth in *Edelman v. Jordan*, 415 U.S. 651, 675-677 (1974) as follows:

> [I]t has not heretofore been suggested that § 1983 was intended to create a waiver of a state's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself.

The effect of the above-quoted language is that merely because an action under 42 U.S.C. § 1983 is brought against individual state officers or employees does not mean that the state treasury can be held accountable for attorney's fees under 42 U.S.C. § 1988. This is because when these individuals are made defendants, either in their individual or official capacity, the state treasury is the real party in interest, as the various states will ultimately reimburse these individuals. This stems from the fact that the various states have either a statutory or moral obligation to protect and indemnify their officers and employees from monetary awards which arise solely by virtue of their employment. It is obvious that if the states failed to do this, they could hardly be expected to be able to employ qualified individuals because of the proliferation of suits brought under 42 U.S.C. § 1983 – a statute utilized in this day and age to attack virtually every aspect of state action.

In the instant situation, the bar of the Eleventh Amendment is fully in place, because there is a total absence of congressional authorization in 42 U.S.C. § 1988 for an award of attorney's fees payable by a state. Such authorization cannot be supplied by a cursory comment[1] in the legislative history of that statute. Given the limited scope of the word "person" in 42 U.S.C. § 1983, congressional authorization for an award of attorney's fees payable by a state requires nothing less than a change in the language of 42 U.S.C. § 1983 itself. This conclusion is dictated by the fundamental position which the Eleventh Amendment occupies in our Constitution and system of federalism. In *Edelman v. Jordan, supra*, at 674, it was found that provisions of the Social Security Act "fell far short of a waiver by a participating state of its Eleventh Amendment immunity." In *Employees v. Missouri Public Health Department*, 411 U.S. 279 (1973), it was held that Congress had not been explicit enough in the statutory text of the Fair Labor Standards Act to override the Eleventh Amendment, where even though the particular state functions in question were encompassed within the literal definition of an "employer" covered by the act, the enforcement provisions contained no specific reference to the states.

If waiver by the states themselves of their Eleventh Amendment immunity will be founded only upon the most express terms or language, then it follows that Congress, acting as the representative of the states under § 5 of the Fourteenth Amendment, can lift that immunity only in the same manner. Here, it has failed to do so, given the strict standard of waiver that must necessarily be read into any attempt to deprive the states of their fundamental Eleventh Amendment immunity. In light of the exclusion of the states from the language of 42 U.S.C. § 1983, an act as profound in its ramifications for the concept of federalism as congressional deprivation of the states' Eleventh Amendment immunity cannot be accomplished by anything less than statutory expansion of the language of 42 U.S.C. § 1983. Supporting this view is the fact that in *Fitzpatrick*

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1. The comment referred to is contained in S. Rep. No. 94-1011, 94th Congress, 2nd Session 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913.

v. Bitzer, supra, at 452, the " 'threshold fact of congressional authorization' . . . to sue the State" was found only after Congress, through amendments in 1972, changed the express language of Title VII of the Civil Rights Act of 1964 to include all "governments". It is important to note that legislative history standing alone was not relied upon in *Fitzpatrick* to support the finding of the requisite congressional authorization for suit. Hence, it can be concluded that Congress, in 42 U.S.C. § 1988, has not overridden the Eleventh Amendment immunity of the states and that that amendment thus protects the states from an award of attorney's fees under 42 U.S.C. § 1988.

A waiver of the Eleventh Amendment immunity cannot be inferred from the continued operation of a prison system by a state. Hence, the decision in *Parden v. Terminal Railway*, 377 U.S. 184 (1964), has no relevance here. The following remarks in the concurring opinion of Justice Marshall in *Employees v. Missouri Public Health Dept., supra*, at 296, are fully applicable in the instant case:

> For me at least, the concept of implied consent or waiver relied upon in Parden approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver. [Cases]. Certainly, the concept cannot be stretched sufficiently further to encompass this case. Here the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case.

These statements regarding hospitals and schools hold true to an even greater extent for state prisons. Obviously, the running of a state penal system is an example of sovereign activity of the most fundamental nature. Nothing could be further from the commercial activity in *Parden* than the operation of a state

prison. Untenable is the notion that a voluntary waiver of the Eleventh Amendment immunity can arise from a state's continuing to run its prison system after the passage in 1976 of 42 U.S.C. § 1988.

Further, an award of attorney's fees cannot escape the Eleventh Amendment by being characterized as merely having an "ancillary effect" on the state treasury. Dollar-for-dollar, an award of attorney's fees depletes a state treasury as much as any other award. Moreover, it is well-known that the amount demanded and allowed for attorney's fees is continually rising, *see, e.g., Commonwealth of Pennsylvania v. O'Neal*, 431 F. Supp. 700 (E.D. Pa. 1977) [attorney's fees of $199,788.37], and given the ever-perilous condition of state fiscs, a financial crisis could conceivably be produced by an award of attorney's fees under 42 U.S.C. § 1988. This is to say nothing of the severe "chilling effect" on the good faith defense by the states of the laws they have enacted and the measures they have taken to deal with the difficult and intractable problems of enhancing the public welfare produced by the prospect of an award of attorney's fees.

It should be noted that the case of *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), cannot be read to stand for the proposition that the Eleventh Amendment has no applicability with regard to "ancilary" matters such as costs. *Fairmont Creamery* involved a writ of error in the United States Supreme Court and must be confined to that unusual context. It was intimated long ago in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821), that a writ of error is not a "suit" under the Eleventh Amendment. Thus, the taxation of costs in this Court, on a writ of error, stands, for purposes of the Eleventh Amendment, on an entirely different footing from such a taxation in the lower federal courts. This conclusion is further buttressed by the fact that this Court is a constitutionally-created court, rather than a congressionally-created one. Therefore, this Court stands on an equal plane with the states under the Constitution, which the lower federal courts do not. Accordingly, the concept of sovereignty which lies behind the Eleventh Amendment cannot provide the kind of defense to a

taxation of costs against the state in the United States Supreme Court than it can to such a taxation in the lower courts.

CONCLUSION

The Eighth Circuit Court of Appeals, by looking to the legislative history of 42 U.S.C. § 1988 rather than to the language of 42 U.S.C. § 1983, applied an incorrect standard in determining whether there had been a congressional deprivation or lifting of the Eleventh Amendment immunity with respect to attorney's fees. For this reason, the Eighth Circuit's judgment must be reversed and the case remanded with directions to that court to order the District Court to vacate the award of attorney's fees.

Respectfully submitted,

RICHARD C. TURNER
Attorney General for the
State of Iowa

STEPHEN C. ROBINSON
Special Assistant Attorney
General

THEODORE R. BOECKER
Assistant Attorney General

FREDERICK M. HASKINS
Assistant Attorney General

ADDENDUM A

IOWA CONSTITUTION, ARTICLE III, § 24:

> Appropriations. SEC. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.

IOWA TORT CLAIMS ACT, IOWA CODE § 25A.22 (1977):

> 25A.22 Actions in federal court. The state shall defend, indemnify and hold harmless an employee of the state in any action commenced in federal court under section 1983, Title 42, United States Code, against the employee for acts of the employee while acting in the scope of employment. If the acts or omissions of the employee, upon which the action is based, are within the exceptions to claim as defined in section 25A.2, subsection 5, paragraph "b", the state shall not indemnify or hold harmless the employee.

CERTIFICATE OF SERVICE

I, Theodore R. Boecker, Assistant Attorney General for the State of Iowa, hereby certify that on this 1st day of December, 1977, three (3) copies of the foregoing *AMICUS CURIAE* BRIEF OF THE STATE OF IOWA were mailed, correct postage prepaid, to:

Philip E. Kaplan
Walker, Kaplan & Mays, P.A.
622 Pyramid Life Building
Little Rock, Arkansas 72201

Stanley Bass
Suite 2030
10 Columbus Circle
New York, New York 10019

I further certify that all parties required to be served have been served.

THEODORE R. BOECKER
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319